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Did Congress Limit the Appellate Court's Discretion to Stay an Alien's Removal from the United States Pending Appeal?

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Case at a Glance

A Cameroonian asylum seeker sought reconsideration of his case based upon new evidence. Reconsideration was denied, and he was ordered removed but sought a stay of removal pending appeal. The Fourth Circuit denied the stay, having recently held that 8 U.S.C. § 1252(f)(2) bars such stays unless clear and convincing evidence demonstrates that removal would violate law. This heightened standard governs aliens' motions to stay removal in the Fourth and Eleventh Circuits, while eight other circuits judge such motions under the ordinary balancing test for preliminary injunctions. The Supreme Court granted certiorari to resolve the circuit split.

Did Congress Limit the Appellate Court's Discretion to Stay an Alien's Removal from the United States Pending Appeal?

by Jessica E. Slavin

PREVIEW of United States Supreme Court Cases, pages 266–271.

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Editor's note: The respondent's brief in this case was not available by *PREVIEW*'s deadline.

Issue

Which standard governs a court of appeals' decision whether to stay an alien's removal from the United States pending consideration of the alien's petition for review: the traditional test for stays and preliminary injunctive relief, or the heightened standard from 8 U.S.C. § 1252(f)(2), which provides that "no court shall enjoin the removal of any alien pursuant to a final order ... Unless the alien shows by clear and convincing evidence that the entry or execution [of the removal order] is prohibited as a matter of law"?

Facts

Petitioner Jean Marc Nken is a citizen of Cameroon who entered the United States lawfully in April 2001 and applied for asylum and withholding of removal eight months later. An immigration judge initially denied Nken's applications for asylum and withholding of removal in April 2003. Following a complicated series of petitions, appeals, and motions to reopen, the case was presented to the Supreme Court in November 2008. In the Supreme Court, Nken seeks review of the Fourth Circuit's denial of his motion to stay a final order for his removal while his appeal is pending.

Nken sought the stay pending appeal after the Board of Immigration Appeals (the BIA) denied his motion to reopen the asylum case based upon recent changed country conditions in Cameroon. The Supreme Court has granted Nken's application for a temporary stay, treating it as a petition for writ of certiorari in order to decide a single question: "Whether the decision of a court of appeals to stay an alien's removal pending consideration of the alien's petition for review is governed by the standard set forth in § 242(f)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(2), or instead by the traditional tests for stays and preliminary injunctive relief."

Nken v. Mukasey
Docket No. 08-681

Argument Date:
January 21, 2009
From: The Fourth Circuit

Nken initially entered the United States on a transit visa, which authorized him to stay here for about a week. He overstayed the visa and sought asylum in December 2001. In his asylum application, Nken stated that as a university student in Cameroon he was arrested, interrogated, and beaten because of his participation in anti-government activities. Specifically, he stated that he was first arrested in Cameroon in 1990 because of his involvement in a protest march. He was detained for approximately one month, during which time he was beaten and interrogated. After his release, he went to live with his brother and later with his parents. His father assisted him in fleeing Cameroon for the Ivory Coast, where he lived for ten years as a student, becoming a member and later an officer in an organization of Cameroonian students in the Ivory Coast. With this new student organization, he participated in three demonstrations at the Cameroonian Embassy.

After a coup d'etat in the Ivory Coast in December 2000, Nken stated, he decided to return to Cameroon but was arrested upon arrival, detained for about one month, and again beaten and interrogated. Nken stated that he was released because his father bribed government officials and that he then fled to the Bahamas and eventually to the United States, seeking medical care in Cameroon before he fled.

After the April 2003 hearing at which Nken testified regarding these matters, the immigration judge (the IJ) denied Nken's application. The IJ raised several questions regarding Nken's testimony and application materials, including the precise nature of Nken's political involvement in Cameroon, the route by which he traveled to first his brother's home and then his father's home after his release from prison, and how he traveled when injured by the alleged beatings. For these and other reasons, the IJ concluded that Nken "failed to meet his burden in establishing past persecution, or that he has a well-founded fear of future persecution."

Nken appealed and in August 2004, the BIA remanded the case, because although the IJ seemed to doubt Nken's credibility, the IJ failed to make any specific credibility determination. On remand, after review of the file and the prior decision, the IJ in March 2005 issued a new oral decision that included an express adverse credibility finding, based upon "inconsistencies, difficulties with the documents, and improbabilities."

Nken again appealed. Also, having married a U.S. citizen, Nken accompanied this appeal with a motion to remand to pursue his wife's pending petition for a permanent resident visa on his behalf. In June 2006, after rejecting Nken's motion to file an untimely appellate brief, the BIA affirmed the immigration judge's new decision, concluding there was "no clear error" in the adverse credibility determination. The BIA furthermore denied the motion to remand, because Nken's wife's petition for his permanent resident visa was only pending, not approved.

Nken moved the BIA to reopen and reconsider, but in September 2006, the BIA denied the motion under 8 C.F.R. § 1003.2, which provides that an alien, generally speaking, may file only one motion to reopen. Nken sought review in the Fourth Circuit, and in an unpublished decision in April 2007, the Fourth Circuit denied the petition, deciding that the adverse credibility finding, the finding of ineligibility for asylum, the denial of leave to file a late brief, and the denial of remand all were justified. Nken filed a second motion to reopen before the BIA in December 2006, but the BIA again rejected the motion, and the Fourth Circuit, in April 2008, again affirmed.

Finally, in May 2008, Nken filed his third motion to reopen the removal proceedings, this time based upon changed country conditions in Cameroon, namely, unrest following the president's move to remove presidential term limits from the constitution in early 2008; and new evidence, including a letter from Nken's brother describing the recent unrest, the brother's arrest by government forces, and Nken's alleged inclusion on a list of 1990s-era anti-government protesters wanted by the government. The BIA denied the motion in June 2008, finding that Nken failed to sufficiently demonstrate changed country conditions because he "failed to submit his own statement or asylum application articulating his persecution claim based on recent reports of civil unrest," particularly in view of the IJ's prior adverse credibility finding. Furthermore, the BIA reasoned, "tragic or widespread savage violence resulting from civil war" is no basis for asylum.

In the same decision, the BIA declined to sua sponte (on its own motion) reopen the proceedings to permit Nken to adjust his status to that of permanent resident based upon his wife's now-approved visa petition. The fact that Nken and his wife were now parents of a U.S. citizen child was not the sort of "exceptional circumstances" to support sua sponte reopening of the proceedings.

Thereafter, Nken sought review in the Fourth Circuit and a stay of removal pending appeal. On the merits, Nken argued that in its hold-

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ing that the new evidence did not link the generalized strife in Cameroon with Nken personally, the BIA apparently had disregarded the brother's statements in the letter that Nken's name appears on a list of known anti-government activists. On the merits, the government responded that Nken was misreading the BIA's decision. With regard to the stay, the government cited the Fourth Circuit's recent holding in *Teshome-Gebreegziabher v. Mukasey,* 528 F.3d 330 (4th Cir. 2008), that § 1252(f)(2) applies to an alien's motion to stay removal and objected that Nken could not demonstrate by clear and convincing evidence that the BIA's order of removal was prohibited as a matter of law.

In a one-sentence decision, the Fourth Circuit denied the motion for a stay. Nken filed a motion in the Supreme Court seeking an emergency stay pending resolution of the appeal in the Fourth Circuit, or in the alternative, asking that the motion be treated as a petition for certiorari. The Court treated the motion as a petition for certiorari, and granted the petition, limited to the question of which standard properly governs an alien's motion for a stay of removal pending appeal.

Case Analysis

Before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), a stay of removal (which was called "deportation" in the pre-1996 code) was usually automatic when an alien filed a petition for review. In the few cases in which the stay was not automatic, the courts applied the traditional balancing test for issuance of stays, generally considering four factors: the alien's likelihood of success on the merits of the petition, the possibility of irreparable harm to the alien, the potential harm to other parties through issuance of the stay, and the public interest.

As the petitioner's brief notes, three of IIRIRA's amendments are relevant to the question presented here. First, in IIRIRA, Congress eliminated the automatic stay of removal pending review, providing instead that "the petition ... does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. § 1252(b)(3(B). That provision specified no standard for the court's consideration of a stay. Second, Congress eliminated the jurisdictional bars that previously had prevented aliens from pursuing petitions for review after removal. See 110 Stat. 3009-612 (repealing 8 U.S.C. § 1105a(c) (1994)). Third, Congress created a new provision, in a separate subsection titled "Limits on Injunctive Relief," codified as 8 U.S.C. § 1252. This new provision limited the availability of classwide injunctive relief in challenges to the new procedural framework established by IIRIRA, and also limited injunctive relief in "[p]articular cases" as follows:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

8 U.S.C. § 1252(f)(2).

Thus, the question for the Court to decide is whether the word *enjoin* in § 1252(f)(2) encompasses an appellate court's decision to stay an alien's removal pending appeal. Eight circuits have continued to apply the traditional test for preliminary injunctions to motions to stay removal pending appeal. *Tesfamichael v. Gonzales,* 411 F.3d 169 (5th Cir. 2005); *Hor v. Gonzales,* 400 F.3d 482 (7th Cir. 2005); *Douglas v. Ashcroft,* 374 F.3d 230 (3d Cir. 2004); *Arevalo v. Ashcroft,* 344 F.3d 1 (1st Cir. 2003); *Mohammed v. Reno,* 309 F.3d 95 (2d Cir. 2002); *Beijani v. I.N.S.,* 271 F.3d 670 (6th Cir. 2001), abrogated on other grounds by *Fernandez-Vargas v. Gonzales,* 548 U.S. 30 (2006); *Andreiu v. Ashcroft,* 253 F.3d 477 (9th Cir. 2001) (en banc); *Lim v. Ashcroft,* 375 F.3d 1011 (10th Cir. 2004).

In contrast, two circuits, first the Eleventh Circuit and now the Fourth Circuit, have held that § 1252(f)(2) applies to an alien's motion for a stay pending appeal and that, therefore, such a stay may not issue without "clear and convincing evidence that the [removal order's entry or execution] is prohibited as a matter of law." *Teshome-Gebreegziabher v. Mukasey,* 528 F.3d 330 (4th Cir. 2008), reh'g en banc denied, 545 F.3d 285 (4th Cir. 2008); *Weng v. U.S. Att'y Gen.,* 287 F.3d 1335 (11th Cir. 2002).

The petitioner's argument opens with the observation that "[t]he power to grant a stay is one of the federal courts' traditional equitable powers. Indeed, it is 'a power as old as the judicial system of the nation.'" The petitioner suggests that a clear statement from Congress is required to evidence congressional intent to deprive the appellate courts of the power to stay the litigation pending appeal. See *Scripps-Howard Radio v. F.C.C.,* 316 U.S. 4, 11 (1942). "Against that backdrop," the petitioner argues, it is incorrect to interpret the word *enjoin* in § 1252(f)(2) to refer to temporary stays pending appeal.

The petitioner acknowledges that the word *injunction* includes "[i]n a general sense, every order of a court

which commands or forbids," see *Black's Law Dictionary* 800 (8th ed. 2004), but emphasizes that at the same time, the law has consistently recognized a more precise meaning of the words *injunction* and *enjoin,* referring to orders controlling a party's conduct, distinct from the term *stay,* referring to orders that temporarily deprive another court's legal order of effect. Thus "[b]ecause a stay temporarily stops the legal effect of an order, whereas an injunction controls the conduct of a party, a court may stay an injunction, [citation omitted], but a court does not 'enjoin' a stay." A similar observation was made by Judge Easterbrook in the Seventh Circuit's opinion holding that § 1252(f)(2) does not apply to motions for stays:

> The Attorney General wants us to treat "stays" as a subset of "injunctions." Certainly there is a functional overlap: a stay, like an injunction, can stop an agency in its tracks. ... But the words nonetheless cover different domains. An "injunction" is an order issued as the relief in independent litigation, while a "stay" is an order integral to a system of judicial review. ... Perhaps the distinction ... rests more on history than on function—especially when the stay's addressee is an agency rather than another judge. Still, it is a long-standing distinction [reflected in the United States Code and Federal Rules of Appellate Procedure]. ...

Hor, 400 F.3d at 484.

The petitioner, furthermore, contends that "[t]his distinction between a stay and an injunction is a matter of substance, not merely semantics," noting that distinct rules of procedure apply to injunctions and stays.

Thus, the petitioner's chief argument is that, in view of the significant distinction between stays and injunctions, § 1252(f)(2) does not apply when a court orders a stay of removal pending appeal, because it only applies to orders to "enjoin" and does not mention orders to stay. See *Hor,* 400 F.3d at 484-85 and *Tesfamichael,* 411 F.3d at 173-74. The petitioner bolsters this basic textual argument with related arguments based upon canons of statutory construction, the structure of the statutory section, and the legislative history.

In addition to textual arguments, the petitioner supports his interpretation by reference to the practical effects of the government's interpretation. To begin with, if the heightened standard applies to motions to stay removal, "in many instances ... courts [would be required] to apply a more stringent standard" to the motion to stay than would have applied to the appeal on the merits. Even in cases in which the petitioner had a great likelihood of success on the merits, the stay would have to be denied unless "clear and convincing evidence" established the petitioner's right to remain in the United States as a matter of law.

This state of affairs is particularly troublesome in cases like the petitioner's, in which the alien's underlying petition asserts the alien's risk of detention, beating, and even execution upon removal. The government surely will point out that under the IIRIRA scheme, there is no longer any jurisdictional bar to continuing review of an alien's petition after the alien's removal from the United States. If the petitioner faces persecution upon removal, however, the fact that review of his case may continue after removal is of little help. The prospect that a bona fide refugee could be removed and harmed before resolution of his petition for review has been a factor in some circuit court opinions rejecting the government's interpretation of the statute. *E.g., Hor,* 400 F.3d at 485 ("The ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim.")

One of the amicus briefs supporting the petitioner points out that the risk of irreparable harm to the alien would be irrelevant under the government's interpretation of § 1252(f)(2), and would make stays unavailable to petitioners raising issues of first impression, close legal questions, or inadequate consideration of the evidence. Indeed, another amicus brief, filed by a group of law professors, argues that under the government's interpretation, § 1252(f)(2) might violate the Suspension Clause of the United States Constitution, because the Suspension Clause requires some judicial review of removal orders, and such severe limits upon the availability of a stay of removal pending review of the alien's appeal would interfere with courts' ability to grant effective relief.

At the time of this writing, the government's brief on the merits had not been filed. However, its likely arguments were previewed in its response to the petitioner's emergency motion for a stay. In that brief, the government first argued that the term *enjoin* encompasses the stay sought by the petitioner, because "[i]n its customary usage, ... an injunction 'command[s] or prevent[s] an action,'" quoting *Black's Law Dictionary.* Moreover, the government contested the petitioner's characterization of a stay of removal as a customary sort of "stay" of a court's own decisions or of the order of an inferior court, because "[d]eportation orders are self-executing orders, not dependent upon judicial enforcement." Thus, the government has argued, because a stay of removal "prevents an

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Executive Branch agency from taking an action that would be entirely lawful [otherwise] .... [t]he most natural label for such an order is an injunction."

The government has refuted the petitioner's arguments based on the structure of the code, by observing that if § 1252(f)(2) does not apply to the petitioner's motion for a stay, "it is unclear when ... [that provision] would ever apply," quoting *Teshome-Gebreegziabher,* 528 F.3d at 334.

As to the practical impact of interpreting § 1252(f)(2) to apply to the petitioner's motion for a stay, the government has emphasized that "one of Congress's primary purposes in enacting IIRIRA in 1996 was to ensure the prompt removal of illegal aliens from the United States," in part by eliminating the automatic stay. Thus, again quoting the Fourth Circuit, the government has contended that "[m]any of [the petitioner's] arguments 'are not really arguments'" against the government's interpretation of the statute, "but are more accurately characterized as arguments against *any* standard other than an automatic stay." In its opposition to the emergency motion and the petition for a writ of certiorari, the government also contended that the petitioner's motion fails even under the more lenient traditional standard.

SIGNIFICANCE

The case's significance was well summarized by Justice Kennedy in an opinion in chambers in another case, quoted in the petitioner's emergency motion:

> The issue is important. If the exacting standard of § 1252(f)(2) applies to requests for temporary stays, then to obtain judicial review aliens subject to removal must do more than show a likelihood of success on the merits. See *Addington v. Texas,* 441 U. S. 418, 425 (1979) (The "intermediate standard of clear and convincing evidence" lies "between a preponderance of the evidence and proof beyond a reasonable doubt"). An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime. It is particularly so in the immigration context, where seekers of asylum and refugees from persecution expect to be treated in accordance with the rule-of-law principles often absent in the countries they have escaped. A standard that is excessively stringent may impede access to the courts in meritorious cases. On the other hand, § 1252(f)(2) is a part of Congress's deliberate effort to reform the immigration law in order to relieve the courts from the need to consider meritless petitions and so devote their scarce judicial resources to meritorious claims for relief. Cf. *Reno v. American-Arab Anti-Discrimination Comm.,* 525 U. S. 471, 486 (1999). If the interpretation adopted by the Second, Sixth, and Ninth Circuits is erroneous, and § 1252(f)(2) governs requests for stays, this congressional effort will be frustrated. As of this point, applicant already has overstayed his visa by more than five years. Had the Eleventh Circuit granted the stay under the more lenient approach, months more would elapse before his case is resolved.
>
> *Kenyeres v. Ashcroft,* 538 U.S. 1301, 1305 (Kennedy, J., in chambers).

The competing considerations detailed by Justice Kennedy in *Kenyeres* are at least as well presented in Nken's case. His asylum application and his recent motion to reopen, if credible, raise serious questions about his safety should he be returned to Cameroon. At the same time, after arriving on a transit visa, Nken has remained in the United States for more than eight years and already has sought, and received, many rounds of agency and judicial review. The government is sure to emphasize its interest in efficient resolution of alien's challenges to removal orders, in part because of the human problems created when an alien lives here during long-pending proceedings, even, as here, marrying a citizen and having a citizen child.

The petitioner's ready response is that review also must be effective, particularly in cases involving claims that removal threatens the alien's life and bodily integrity. The government's position is weakened by the common perception, detailed in one of the amicus briefs, that agency review of alien appeals in the current system is arbitrary and unreliable. For instance, in a 2005 decision, "Judge Posner [] observed that the Seventh Circuit had 'reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review ... on the merits.'"

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